(3)

Supreme Court, U.S.
FILED
DEC 2 1992
OFFICE OF THE CLERK

NO.: 92-771

In The

Supreme Court of the United States

October Term, 1992

Eugene Hasenfus and Kasanee Sawyer,

Petitioners,

v.

Richard Secord and Southern Air Transport,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHERN AIR TRANSPORT, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT M. BECKMAN, ESQ.
(counsel of record)
DAVID M. KIRSTEIN, ESQ.
BECKMAN, KIRSTEIN & MURPHY
2445 M Street, N.W.
Suite 340
Washington, D.C. 20037-1420
Telephone: (202) 835-3200

DWIGHT SULLIVAN, ESQ.
3110 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-0100
Telephone: (305) 375-0100

Attorneys for Respondent
SOUTHERN AIR TRANSPORT, INC.

BEST AVAILABLE COPY

32 pp

QUESTIONS PRESENTED

In addition to the questions presented by Petitioner, the following question is presented:

1. Whether this Court has jurisdiction of a petition for certiorari that was received 91 days after the entry of the judgment below, was not sent to the Clerk by first-class mail, and was not placed on the docket for an additional 10 days after its receipt because Petitioner's counsel was not a member of the Bar of this Court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF CONTENTS	(ii)
TABLE OF AUTHORITIES	(iii)
JURISDICTION	1
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. This Court Lacks Jurisdiction Due to Late-Filing	3
II. Petitioners' Questions Were Not Argued Below	6
III. There Are No Special or Important Reasons for Review	7
IV. Only Questions of Evidence and Factual Findings Which Were Correctly Decided Below Are Involved	8
CONCLUSION	12
APPENDIX	
Opinion and Order of the District Court Denying Plaintiffs' Motion for a New Trial, January 7, 1991	

TABLE OF AUTHORITIES

Cases:	Page
Browning-Ferris Indus. v. Kelco Disposal, Inc. 492 U.S. 257 (1989)	7
Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989)	9
City of Springfield v. Kibbe, 480 U.S. 257 (1987)	7
General Pictures Co. v. Western Electric Co., 304 U.S. 175 (1938)	8, 9
Gooding v. University Hospital Bldg., Inc., 445 So.2d 1015 (Fla. 1984)	9
Graver Tank Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949), *aff'd*, 339 U.S. 605 (1950)	8
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)	7
Hasenfus v. Secord, 962 F.2d 1556 (11th Cir. 1992)	9-10
Houston v. Lack, 487 U.S. 266 (1988)	4, 6
Layne & Bowler Corp. v. Western Well Works, Inc. 261 U.S. 387 (1923)	7
Lindemood v. Commissioner of Internal Revenue, 566 F.2d 646 (9th Cir. 1977)	5
Magnum Import Co. v. Coty, 262 U.S. 159 (1923)	8
Matter of Bad Bubba Racing Products, 609 F.2d 815 (5th Cir. 1980)	4
Missouri v. Jenkins, 495 U.S. 33 (1990)	2, 4
Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70 (1955)	7
Rogers v. Lodge, 458 U.S. 613, *reh'g denied* 459 U.S. 899 (1982)	8
United States v. Locke, 471 U.S. 84 (1985)	4
United States v. Lombardo, 241 U.S. 73 (1916)	4
United States v. Johnston, 268 U.S. 220 (1925)	8

	Page
Statutes and Rules:	
28 U.S.C. § 2101(c) (1988)	1, 3
Supreme Court Rule 10.1(a)	8
Supreme Court Rule 12.1	6
Supreme Court Rule 13.1	4
Supreme Court Rule 13.3	4
Supreme Court Rule 28.2, 28 U.S.C.A. Rules (1984)	5
Supreme Court Rule 29.2	3, 4, 5
39 C.F.R. § 320.6	3
Treatises:	
W. Page Keeton et al, *Prosser and Keeton on the Law of Torts* (5th Ed. 1984)	10
Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Rules, The 1990 Revisions (1990)*	5
Miscellaneous:	
United States Postal Service, Domestic Mail Manual (Issue 44, 9/20/92)	3

NO.: 92-771

In The

Supreme Court of the United States

October Term, 1992

Eugene Hasenfus and Kasanee Sawyer,

Petitioners,

v.

Richard Secord and Southern Air Transport,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHERN AIR TRANSPORT, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Southern Air Transport, Inc.,[1] respectfully submits that, for the following reasons, the case should not be reviewed by this Court: (a) The Court lacks jurisdiction because the Petition for Writ of Certiorari was not timely filed; (b) Petitioners' questions were not presented to the court below; (c) Petitioners merely seek another bite at the apple; there are no special and important reasons for review; and (d) The courts below correctly applied the applicable rules of negligence and contract termination.

JURISDICTION

The writ of certiorari was not applied for within the 90 days after entry of judgment mandated by 28 U.S.C. § 2101(c) (1988). The 90-day limit is jurisdictional. This

[1] Southern Air Transport has no parent or subsidiary company to be listed.

Court lacks authority to extend the period for filing except as Congress permits. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

The petition met none of the conditions set out in the Court's Rules to be timely filed: it was not received by the Clerk until the 91st day after entry of judgment below; it was not sent to the Clerk by first-class mail; it was not filed by a prisoner.

OPINIONS BELOW

Petitioners' appendix does not include the opinion of the district court of January 7, 1991, setting forth the district court's reasons for instructing the jury that Hasenfus' contract terminated on October 5, 1986, the day his plane was shot down. It is reprinted in the Appendix hereto.

STATEMENT OF THE CASE

For the purpose of determining whether there are special and important reasons for granting the petition, the material facts are set forth in the opinions of the district court and the court of appeals printed in the Appendices to the petition supplemented by the opinion printed in the Appendix to this opposition.

The facts relating to the jurisdiction of this Court are as follows: On October 22, 1992, the day the petition was required to be filed with the Clerk of the Court, Petitioners delivered the petition to express mail, which is not first-class mail and which competes with private delivery services. The petition was received by the Clerk on October 23, 1992, 91 days after entry of judgment. However, the Clerk did not treat the petition as ready to be docketed on that day because Petitioner's counsel, Brian R. Strange, was not a member of the Bar of this Court. Mr. Strange applied to become a member. Respondent Southern Air Transport understands that the Clerk held the petition and did not file the petition

and docket the case until some time around November 2, 1992, after Mr. Strange became a member of the Court's Bar.

REASONS FOR DENYING THE WRIT

I.
THIS COURT LACKS JURISDICTION DUE TO LATE-FILING

The Petition for Writ of Certiorari was sent by express mail on October 22, 1992, to the Clerk, United States Supreme Court. The Petition was received on October 23, 1992, one day more than the 90 days permitted by 28 U.S.C. § 2101(c) (1988). No extension had been requested or granted.

The Court lacks jurisdiction because the petition was not received by the Clerk within 90 days and because it was not "sent to the Clerk by first-class mail" which Supreme Court Rule 29.2 says can constitute being "timely filed". The petition was delivered by "express mail". Express mail is a different class of service from first-class mail. It is more than twice as expensive and is intended to compete with private delivery services such as UPS or Federal Express. See United States Postal Service, Domestic Mail Manual Ch. 2 (express mail) and Ch. 3 (first class mail) (Issue 44, 9/20/92); 39 C.F.R. § 320.6 (urgent delivery exception).

This Court's jurisdiction to grant a writ of certiorari requires that it be "applied for within ninety days after the entry of such judgment or decree." 28 U.S.C. § 2101(c) (1988). The Court has recently explained,

> Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the State's petition was filed within 90 days of the

entry of the Court of Appeals' judgment, we must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33, 45 (1990).

Supreme Court Rule 13.1 provides that a petition for a writ of certiorari "shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment." "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them." *United States v. Locke*, 471 U.S. 84, 101 (1985) (filing statutorily required documents one day late results in loss of mining claim). Supreme Court Rule 13.3 provides: "The Clerk will refuse any petition for a writ of certiorari which is jurisdictionally out of time." *See also United States v. Lombardo*, 241 U.S. 73, 76 (1916) (filing is not complete until the document is delivered to the office and received, not sent through the United States mail); *Matter of Bad Bubba Racing Products, Inc.*, 609 F.2d 815, 816 (5th Cir. 1980) (notice of appeal that is mailed within the time for appeal is "not equivalent to filing it" if it is not received and filed within ten days). *Compare, Houston v. Lack*, 487 U.S. 266, 276 (1988) (in the unique circumstances of a *pro se* prisoner who deposited a notice of appeal with the prison authorities 27 days after judgment, and the record does not show when the district court actually received it although it was stamped "filed" 31 days after judgment, *i.e.*, after the expiration of the 30-day filing period, was held to have been "filed" within the meaning of the statute on the day that the notice was delivered to prison officials for forwarding to the clerk of the court).[2]

The methods for timely filing are set forth in the 1990 revision of Rule 29.2. The 1990 revision makes clear that this Court intended only first-class and not express mail to be an

---

[2] Four justices dissented saying the majority's rule was a good one but should be adopted by amendment of the Rules. This was done in the 1990 revisions of the Supreme Court Rules. *See* Sup. Ct. R. 29.2.

acceptable alternative to actual receipt by the clerk. Before 1990, the applicable rule, Rule 28.2, read,

> 2. To be timely filed, a document must be received by the Clerk within the time specified for filing, except that any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid.

Sup. Ct. R. 28.2, 28 U.S.C.A. Rules (1984).

The 1990 revision put the timely filed requirements in new Rule 29.2 and made significant changes to clarify that only first-class mail would constitute timely filing.

> 2. To be timely filed, a document must actually be received by the Clerk within the time specified for filing; or be sent to the Clerk by first-class mail, postage prepaid.

Sup. Ct. R. 29.2.

The Court's statement that a document must be sent "by first-class mail" is a clear indication of intent. It is familiar law that exceptions should be narrowly construed. New Rule 29.2 modified the 1980 innovation of timely filing of documents by U.S. mail and states that the U.S. mail service that can be used is confined to "first-class mail". Robert L. Stern, Eugene Gressman and Stephen M. Shapiro, *Supreme Court Rules, The 1990 Revisions* 3-4 (1990).

The Court's specific and carefully crafted revised rules on filing are not subject to further functional equivalency analysis. The Court anticipated, and negated, any argument of equivalency to first-class mail when, in the 1990 revisions to its Rules, it added as the last sentence to Rule 29.2 that "a private delivery or courier service" (obviously superior to first-class mail) was not within the first-class mail exception. *See Lindemood v. Commissioner of Internal Revenue*, 566 F.2d 646, 649 (9th Cir. 1977) (regulations stating explicitly what constitutes "timely filed" leave "no room for exceptions or judicial interpretation").

There are no unique circumstances (*e.g.*, *pro se* prisoner) to invoke any consideration of equity. Moreover, an equitable functional equivalency analysis is inappropriate because there would be no bright-line rule. In *Houston v. Lack*, the Court confirmed the general rule but made an exception for delivery to prison authorities. 487 U.S. at 274. Because reference to the prison mail log "will generally be a straightforward inquiry," it created a "bright-line rule, not an uncertain one." *Id.* at 275. Accepting express mail for first-class mail creates no bright-line rule because it leaves open every type of delivery other than private delivery or courier service.

In this case, even considering express mail as equivalent to first-class mail does not establish jurisdiction. The petition in this case was not capable of being accepted for filing on the day it was received by express mail (October 23rd), because Petitioner's counsel of record, Mr. Strange, was not a member of the Bar of this Court. *See* Sup. Ct. R. 12.1.

This is no *pro se* petitioner. Mr. Strange is an experienced advocate who could have and should have dispatched the petition in time to have it received by the 90th day. Mr. Strange could have and should have had the petition signed by a member of the Bar of this Court. There was no impediment to compliance with the Court's rules as written. Accepting this petition undermines the integrity of the rules.

II.
PETITIONERS' QUESTIONS WERE NOT ARGUED BELOW

Petitioners did not raise below the due process claims they present in their petition. Petitioners argued and reargued below that the district court and the court of appeals erred in applying Florida tort and contract law to the facts. Their petition here raises, for the first time, the claims that their due process rights were violated by (1) the district court's directed

verdict on and the court of appeals' affirmance of Sawyer's negligence claim and (2) the district court's jury instruction on and the court of appeals' affirmance of the instruction on Hasenfus' contract claim.[3]

This Court's standard for granting certiorari is that "we will not review a question not pressed or passed on by the courts below." *City of Springfield v. Kibbe*, 480 U.S. 257, 266 (1987). *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

III.
THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW

There is no conflict among the circuits, no federal question. Only Petitioners are affected; they do not claim that anyone else is affected by the decision below, or that the decision below involves principles of importance to the public. This Court consistently denies writs of certiorari in such circumstances. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77-80 (1955), citing *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

---

[3] In their Petition for Writ of Certiorari at pp. 6-7, Petitioners note that they raised as errors in their petition for rehearing to the court of appeals the issues which Petitioners here present for the first time as due process violations.

IV.
ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS WHICH WERE CORRECTLY DECIDED BELOW ARE INVOLVED

Petitioners ask the Court to review the evidence and inferences drawn from the evidence. This was done by the district court and, *de novo*, by the court of appeals. Granting of the writ for this purpose is not warranted. It is contrary to the Court's long-standing principles applied to evaluating certiorari petitions. *See General Pictures Co. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

Petitioners' fly specking of the court of appeals' discussion of the evidence contained in the 3,600 page trial transcript in this case falls far short of demonstrating that the appellate court "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). "[J]urisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). When, as in the instant case, the appeals court is affirming the district court, this Court has often held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *aff'd*, 339 U.S. 605 (1950); *Rogers v. Lodge*, 458 U.S. 613, 623, *reh'g denied*, 459 U.S. 899 (1982).

Petitioners' argument has nothing to do with any denial of due process by the courts below. The substance of Petitioners' complaint about the directed verdict and its affirmance is

first, that the court of appeals "overlooked" Hasenfus' testimony that it "was much safer to fly in the night" and "misconstrued" a sentence of Wilburn's testimony. Pet. at 12-15. Second, Petitioners contend that the aircraft was at 3,000 feet when it was hit by the heat-seeking missile and not at 500 to 800 feet. Pet. at 9-11. If Petitioners contentions were correct (and they are not), these are not due process issues. They are surely not very obvious and exceptional showings of error. Review would not be warranted. *See General Pictures Co. v. Western Electric Co.*, 304 U.S. 175 (1938). Moreover, none of the alleged errors alone or combined even relates to the material facts upon which both the lower courts based their conclusions.

In affirming the district court's grant of a directed verdict on negligence, the court of appeals applied the tests set forth in *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989) (a mere scintilla of evidence is not sufficient to defeat a motion for directed verdict) and *Gooding v. University Hospital Bldg., Inc.*, 445 So.2d 1015, 1018 (Fla. 1984) (the trial court is required to direct a verdict for the defendants when there is no more than a mere possibility of causation). Petitioners do not seek review of those principles which control the instant case. The court of appeals stated:

> Viewing this evidence in its entirety, we agree with the district court that appellants did not introduce substantial evidence that the absence of an inertial navigation system proximately caused Sawyer's death. The testimony of Baker and Wilburn raises the possibility that equipping the plane with an INS would have prevented it from being shot down. But Baker and Wilburn's other statements, and the consistent testimony of the other witnesses, showed that equipping the plane with an INS probably would not have reduced the risk posed by surface-to-air missiles. Because appellants' case raised no more than a possibility that appellees' negligence was the proximate cause of their injury, the district court was

obligated to direct a verdict for appellees. *Gooding*, 445 So.2d at 1018.

Hasenfus v. Secord, 962 F.2d 1556, 1561 (11th Cir. 1992).

Petitioners' assertions of alleged flaws in the court of appeals' fact analysis of the directed verdict are not correct. The Petitioners' assertion that it was "much safer" to fly at night is a rehash of the argument they made at least twice to each of the two lower courts. Pet. at 12-17. The Hasenfus testimony which Petitioners now says is critical (Pet. at 14-15), garnered less than two sentences in petitioners' opening brief to the court of appeals and no reference in their reply brief.[4] As for the Wilburn testimony (Pet. at 12-14), the court of appeals specifically considered that testimony in light of all the other testimony and concluded that Wilburn's testimony did not create a triable issue of negligence because there was no evidence of unreasonable conduct.[5] *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 31, at 170 (5th Ed. 1984).

---

[4] Given that the other witnesses were experienced combat pilots, one of whom, the chief pilot, had over 5000 hours experience with the aircraft on similar missions, it is not surprising that Petitioners like the courts below, did not consider Hasenfus' testimony significant.

[5] The Petitioners' argument that the court of appeals improperly weighed the evidence is frivolous. Pet. at 15-17. The court below applied the proper standard which required it to look at all the evidence. The court of appeals as well as the district court drew every reasonable and logical inference in favor of Petitioners. The Petitioners mischaracterize both the appellate court's analysis and the evidence. Wilburn left in June and was never involved in considering whether flights would be performed at night. Wilburn never testified that the missions could be successfully performed at night. Hasenfus specifically testified that he did not participate in the decision about when to fly and did not know the reasons for the decision. [R. 22-421-182-83]. As the court of appeals specifically noted, Baker testified that the planes had to descend to 400 feet. There was no evidence this could be done safely at night. The uncontradicted testimony of all the pilots was that none of them considered it safe to fly low at night in mountainous jungle terrain.

The court of appeals noted correctly that all the pilots testified that to complete the missions in the south it was necessary to come down to 400 to 800 feet which exposed the aircraft to missile, anti-aircraft, and small arms fire day or night. Given this reality, the danger of flying low over the jungle at night, the greater opportunities for evasive maneuvers in daylight and the need for precision in dropping the supplies, the pilots considered their options, weighed the risks of day versus night, and concluded that both safety and accuracy considerations militated in favor of daytime resupply flights in southern Nicaragua.

Contrary to Petitioners' assertion, the court of appeals did not specify exactly how low the plane was when it was hit. It was irrelevant to the issue of liability whether the aircraft was at 800 feet or 3,000 feet (instead of at 10,000 feet where there was little risk of being hit[6]) since all the testimony was that the operational conditions, such as the need to visually see the drop zone and the need for pinpoint accuracy which required low level flight, rather than any conduct of the defendants, created the risk of a missile hit. *See* Pet. at 0-2-15-16.

---

[6] Witnesses testified that the standard procedure, which was used on the day of the attack, would be to fly in through the clouds at 10,000 to 14,000 feet (above the range of the missiles) and then descend to 8,000 feet before the final descent to 400 feet at the drop zone. The missiles were effective as high as 8,000 feet. [R. Hasenfus 22-421-186-189; Piowaty 36-435-2530-33].

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. BECKMAN, ESQ.
(Counsel of Record)
DAVID M. KIRSTEIN, ESQ.
BECKMAN, KIRSTEIN & MURPHY
2445 M Street, N.W.
Suite 340
Washington, D.C. 20037-1420
Telephone: (202) 835-3200

DWIGHT SULLIVAN, ESQ.
3110 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-0100
Telephone (305) 375-0100

Attorneys for Respondent
SOUTHERN AIR TRANSPORT, INC.

Dated: December 2, 1992